Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 08–151 OF 2007(N)
ABDUL HAMID MOHAMAD CHIEF JUSTICE, ZAKI AZMI PCA AND ARIFIN ZAKARIA FCJ
15 MAY 2008

Constitutional Law — Courts — Jurisdiction of the Federal Court — Suits commenced in sessions court — Whether r 137 of the Rules of the Federal Court 1995 permits appeal up to Federal Court — Whether points of law could be 'referred' to Federal Court — Courts of Judicature Act 1964 ss 16 & 17 — Rules of the Federal Court 1995 r 137

The respondents were the plaintiffs who brought a claim for bereavement and funeral expenses under s 7 of the Civil Law Act 1956 ('the CLA') after the expiry of the limitation period under s 7(5) of the CLA. The case involved only two issues ie liability and the issue of limitation. The sessions court's decision favoured the respondents and therefore the applicant, the defendant in that case, appealed to the High Court. The High Court allowed the appeal. Subsequently, the respondents appealed to the Court of Appeal and his appeal was allowed. Hence the application, by the applicant, for leave to appeal to the Federal Court. At the hearing of the application, the respondents raised a preliminary objection that the application for leave was defective as the suit had originated in the sessions court. The Federal Court thereafter dismissed the application whereupon the applicant filed this application for leave to appeal to this court or, as an alternative prayer, to refer the issues that had arisen on a point of law to this court under r 137 of the Rules of the Federal Court 1995 ('RFC'). In effect the applicant sought to invoke r 137 of the RFC to indirectly bring from the Court of Appeal, this case which originated in the sessions court. In so doing the applicant relied on *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101 (*Eric Chia*'s case).

Held, dismissing the application with costs:

(1) (per **Abdul Hamid Mohamad Chief Justice**) The jurisdiction of the Federal Court is given by law ie the Federal Constitution ('Constitution') and statute. The law provides that an appeal from a decision of the sessions court ends at the Court of Appeal. There is no

provision anywhere in the law that allows such an appeal to this court (see para 9); *Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor* followed.

(2) (per **Abdul Hamid Mohammad Chief Justice**) On the issue of whether r 137 of the RFC allows issues of law to be 'referred' to the Federal Court, the answer should again be a 'no'. When a matter ends in the Court of Appeal, then the whole matter ends there. There has to be a provision in the law for the Federal Court to have the jurisdiction to have such issues of law referred to it. There is no valid reason for a distinction to be made in respect of appeal and a 'reference'. Moreover, an appeal always included an appeal on points of law. Had Parliament intended that 'points of law' from such cases, though not appealable, may be referred to the 'Federal Court', it would have done so, but those 'points of law' have been shut out from the Federal Court by statute when it prohibits the appeals (see para 22).

(3) (per **Arifin Zakaria FCJ and Zaki Azmi PCA**) Rule 137 of the RFC cannot be construed as another avenue to bring a case originating in the subordinate court to the Federal Court. Although the RFC has the force of law because it is made pursuant to a power conferred by a statute, the Court of Judicature Act 1964 ('the CJA'), as a subsidiary legislation, it cannot exceed the powers conferred by the statute pursuant to which it is made. Therefore, it cannot purport to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights. (see paras 25 & 37).

(4) (per **Zaki Azmi PCA**) It is to be noted that the word 'Court' in r 137 of the RFC is defined as the Federal Court and is intended to be a reminder that the Federal Court has the power to hear any application or make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the 'Federal Court'. It is not intended to enable the Federal Court to review decisions of any other court. If there is injustice or abuse of the process of any court then it could be corrected by way of an appeal but only to the extent allowed by the Constitution and the CJA. Since, cases originating in the sessions court must end in the Court of Appeal, any injustice or abuse of the process of the court could only be corrected by that court as an apex court. Otherwise the limitation of appeals intended by Parliament will never be achieved (see para 44).

(5) (per **Abdul Hamid Mohamad Chief Justice**) In *Eric Chia*'s case, which is a criminal case, the Federal Court exercised its inherent jurisdiction and allowed the application of the applicant to review the decision of the Court of Appeal, even though the case commenced in the sessions court. However, the reasoning in *Eric Chia*'s case is flawed and that case cannot be resorted to in support of this application. In any case, the

judgment in *Eric Chia*'s case says nothing on the issue of whether r 137 of the RFC 1995 empowers the Federal Court to allow a reference to points of law to be made to it, in a case arising from the sessions court (see paras 13, 20 & 28); *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101 not followed.

[Bahasa Malaysia summary

Responden-responden adalah plaintif-plaintif yang memulakan tindakan untuk kematian dan perbelanjaan pengebumian di bawah s 7 Akta Undang-Undang Sivil 1956 ('Akta') selepas tamat tempoh had masa di bawah s 7(5) Akta. Kes tersebut melibatkan hanya dua isu iaitu, liabiliti dan isu had masa. Keputusan mahkamah sesyen memihak kepada responden-responden dan oleh itu, pemohon, iaitu defendan dalam kes tersebut, merayu ke Mahkamah Tinggi. Mahkamah Tinggi membenarkan rayuan tersebut. Kemudian, responden-responden merayu ke Mahkamah Rayuan dan rayuannya dibenarkan. Maka rayuan ini, oleh pemohon, untuk kebenaran merayu ke Mahkamah Persekutuan. Semasa perbicaraan permohonan tersebut, responden-responden membangkitkan bantahan awalan bahawa kebenaran untuk kebenaran tersebut adalah cacat kerana tindakan bermula di mahkamah sesyen. Mahkamah Persekutuan kemudian menolak permohonan tersebut menyebabkan pemohon memfailkan permohonan ini untuk kebenaran merayu ke mahkamah ini atau, memohon secara alternatif, untuk merujuk isu-isu yang berbangkit atas poin undang-undang ke mahkamah ini di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP'). Sebenarnya pemohon memohon untuk menggunakan k 137 KMP untuk membawa, secara tidak langsung, dari Mahkamah Rayuan, kes ini yang dimulakan di mahkamah sesyen. Dalam berbuat demikian perayu menyandar atas kes *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101 (kes *Eric Chia*).

Diputuskan, menolak permohonan dengan kos:

(1) (oleh **Abdul Hamid Mohamad Ketua Hakim**) Bidang kuasa Mahkamah Persekutuan diberikan oleh undang-undang iaitu Perlembagaan Persekutuan (Perlembagaan) dan statut. Undang-undang memperuntukkan bahawa sesuatu rayuan dari keputusan mahkamah sesyen berakhir di Mahkamah Rayuan. Tiada peruntukan di mana-mana di dalam undang-undang yang membenarkan rayuan sedemikian ke mahkamah ini (lihat perenggan 9); *Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor* diikut.

(2) (oleh **Abdul Hamid Mohamad Ketua Hakim**) Atas isu sama ada k 137 KMP membenarkan isu-isu undang-undang 'referred' ke Mahkamah

Persekutuan, jawapannya adalah sekali lagi 'no'. Apabila sesuatu perkara tamat di Mahkamah Rayuan, keseluruhan perkara tamat di situ. Perlu ada peruntukan di dalam undang-undang untuk Mahkamah Persekutuan mempunyai bidang kuasa untuk menerima isu-isu undang-undang yang sedemikan dirujuk kepadanya. Tidak ada alasan yang munasabah untuk perbezaan dibuat berkaitan dengan rayuan dan 'rujukan'. Malahan, sesuatu rayuan biasanya termasuk rayuan atas poin undang-undang. Jika Parlimen menghasratkan bahawa 'points of law' dari kes-kes yang sedemikian, walaupun tidak boleh dirayu, boleh dirujuk ke 'Mahkamah Persekutuan', ia mungkin akan berbuat demikian, tetapi 'points of law' tersebut telah dikecualikan dari Mahkamah Persekutuan oleh statut apabila ia menghalang rayuan. (lihat perenggan 22)

(3) (oleh **Arifin Zakaria HMP dan Zaki Azmi PMR**) Kaedah 137 KMP tidak boleh ditafsir sebagai jalan lain untuk membawa kes yang dimulakan di mahkamah rendah ke Mahkamah Persekutuan. Walaupun, KMP mempunyai kuasa undang-undang kerana ia dibuat menurut kuasa yang diberikan oleh statut, Akta Mahkamah Kehakiman 1964 ('AMK'), sebagai undang-undang subsidiari, ia tidak boleh melampaui kuasa yang diberikan oleh statut di bawah mana ia dibuat. Oleh itu, ia tidak boleh mencuba untuk memberikan bidang kuasa baru yang tidak pernah wujud sebelumnya atau meluaskan bidang kuasa tersebut, atau mewujudkan atau mengubah hak-hak substantif. (lihat perenggan 25 & 37).

(4) (oleh **Zaki Azmi PMR**) Ia perlu diperhatikan bahawa perkataan 'Court' di dalam k 137 KMP didefinisikan sebagai Mahkamah Persekutuan dan dihasratkan sebagai peringatan bahawa Mahkamah Persekutuan mempunyai kuasa untuk mendengar apa-apa permohonan atau membuat apa-apa perintah yang perlu untuk menghalang ketidakadilan atau untuk menghalang salah guna proses 'Federal Court'. Ia tidak dihasratkan untuk membolehkan Mahkamah Persekutuan menyemak semula keputusan-keputusan mahkamah yang lain. Jika terdapat ketidakadilan atau salah guna proses mana-mana mahkamah, ia boleh dibetulkan melalui rayuan tetapi hanya setakat yang dibenarkan oleh Perlembagaan dan AMK. Oleh kerana kes-kes yang dimulakan di mahkamah sesyen mesti tamat di Mahkamah Rayuan, maka apa-apa ketidakadilan atau salah guna proses mahkamah hanya boleh dibetulkan oleh mahkamah tersebut sebagai mahkamah yang tertinggi. Jika tidak, had untuk merayu yang dihasratkan oleh Parlimen tidak mungkin boleh dicapai (lihat perenggan 44).

(5) (oleh **Abdul Hamid Mohamad Ketua Hakim**) Di dalam kes *Eric Chia*, yang merupakan kes jenayah, Mahkamah Persekutuan melaksanakan bidang kuasa sedia adanya dan membenarkan permohonan pemohon

untuk menyemak keputusan Mahkamah Rayuan, walaupun kes tersebut dimulakan di mahkamah sesyen. Tetapi, alasan di dalam kes *Eric Chia* adalah salah dan kes tersebut tidak boleh dirujuk untuk menyokong permohonan ini. Walau bagaimanapun, penghakiman di dalam kes *Eric Chia* tidak menyatakan apa-apa atas isu sama ada k 137 KMP memberikan kuasa kepada Mahkamah Persekutuan untuk membenarkan rujukan atas poin undang-undang dibuat kepadanya, di dalam kes yang berbangkit dari mahkamah sesyen (lihat perenggan 13, 20 & 28); *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101 tidak diikut.]

Notes

For cases on jurisdiction of the Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1919–1921.

Cases refered to

Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771 (refd)
Attorney General v Sillem (1864) 11 ER 1200 (refd)
Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
Barraclough v Brown [1897] AC 615 (refd)
Colonial Sugar Refining Ltd v Irving [1905] AC 369 (refd)
Dato' Mohamed Hashim Shamsuddin v Attorney General, Hong Kong [1986] 2 MLJ 112 (refd)
Harbhajan Singh Sodhi, Re AIR (29) 1942 Nagpur 38 (refd)
Kuan Hip Peng v Yap Yin & Anor [1965] 1 MLJ 252 (refd)
Lee Cheng Yee (suing as administrator of the estate of Chia Miew Hien) v Tiu Soon Siang t/a Tiyor Soon Tiok & Sons Company & Anor [2004] 1 MLJ 670 (refd)
PP v Hoo Chang Chwen [1962] MLJ 284 (refd)
PP v RK Menon & Anor [1978] 2 MLJ 152 (refd)
Soo Leot, Re [1956] MLJ 54 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
R v The Lachiran ILR 28 Bom 533 (refd)
Tan Sri Eric Chia Eng Hock v PP [2007] 2 MLJ 101; [2007] 1 CLJ 565 (not folld)

Legislation referred to

Civil Law Act 1956 ss 3(1), 7, 7(5), 16, 26, 27, 28, 28A
Code of Criminal Procedure 1898 [Indian] s 439
Code of Criminal Procedure 1973 [Indian] s 397(2)
Court of Judicature Act 1964 ss 16, 17, 50, 50(1), 67, 87, 87(1), 96, 96(a), 96(b)
Criminal Procedure Code s 323

Industrial Relations Act 1967 s 33A
Housing Development (Control and Licensing) Act 1966 s 16Z
Penal Code s 409
Rules of the Federal Court 1995 rr 2, 137
Rules of the High Court 1980 O 18 r 18
Subordinate Courts Rules 1980 O 14 r 14

Appeal from: Civil Appeal No N-04–188 of 2004 (Court of Appeal, Putrajaya)

RJ Manecksha (V Natnavathy with him) (Matthew Thomas & Co) for the appellant.
Cyrus Dass (AC Vohrah with him) (Vohrah & Tan Chee Lan) for the respondent.

Abdul Hamid Mohamad Chief Justice:

[1] Like application No 08–149 of 2007(P) (*Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor*), this application was also heard on 28 January 2008. We dismissed it. These are my grounds.

[2] The first and second respondents are the parents of the deceased who died in a road accident on 11 December 1993. They brought a claim for bereavement and funeral expenses under s 7 of the Civil Law Act 1956 ('the CLA 1956') in the sessions court at Seremban, on 6 December 1977, that is, 11 months and 23 days *after* the expiry of the limitation period under s 7(5) of the Act. The case proceeded on two issues only ie on liability and on the issue of limitation. The sessions court gave judgment for the respondents. The applicant appealed to the High Court. The High Court allowed the appeal. The High Court held that as the claim was under s 7 of the CLA 1956 wherein there was a specific provision in that Act as regards limitation under s 7(5) and as the provision was absolute with no exception, it need not be pleaded in the statement of defence.

[3] The respondents appealed to the Court of Appeal. The Court of Appeal allowed the appeal. The reason given by the Court of Appeal may be summarised as follows:

(a) The issue of limitation must be pleaded in the statement of defence for cases under s 7 of the CLA 1956 and s 7(5) does not provide an absolute bar for cases filed after the expiry of limitation.

(b) The Court of Appeal case of *Lee Cheng Yee (suing as administrator of the estate of Chia Miew Hien) v Tiu Soon Siang t/a Tiyor Soon Tiok & Sons Company & Anor* [2004] MLJ 670 was per incuriam as it failed to consider O 14 r 14 of the Subordinate Courts Rules 1980 ('SCR 1980')

and O 18 r 18 of the Rules of the High Court 1980 ('RHC 1980') and therefore did not bind the court which had coordinate jurisdiction.

(c) The Federal Court decision of *Kuan Hip Peng v Yap Yin & Anor* [1965] 1 MLJ 252 is not an authority that decided that the limitation under s 7(5) of the CLA 1956 need not be pleaded in a statement of defence as in that case there was an application to strike out.

(d) The applicant used limitation as an 'ambush tactic' as it was only raised at submissions stage.

[4] The applicants applied for leave to appeal to this court (the first application). The questions posed were:

(a) Considering that s 7(5) of the Civil Law Act 1965, is absolute in nature and contains no exceptions, does it therefore not follow that the provisions of the Limitation Act 1953, will not apply in circumstances when the said s 7(5) applies. And therefore as s 7(5) is a statutory bar and absolute in nature, a party relying upon it need not, by the law of procedure, specifically plead it?

(b) Is s 7(5) of the Civil Law Act 1956 substantive law or procedural requirement that has to be pleaded?

(c) Was the Court of Appeal correct in its decision that the decision of the earlier Court of Appeal in *Lee Cheng Yee (suing as administrator of the estate of Chia Miew Hien) v Tiu Soon Siang t/a Tiyor Sons Tiok & Sons Company & Anor* [2004] 1 MLJ 670 wherein the facts in that case is on all fours with this case was per incuriam?

[5] When the first application was heard by this court, learned counsel for the respondents raised a preliminary objection that the application for leave was defective as the suit had originated in the sessions court. This court dismissed the application. The applicants then filed this application (the second application) praying for leave to appeal to this court 'or alternatively to refer the issues hereunder set out to the Federal Court under its inherent jurisdiction as provided under r 137 of the Rules of the Federal Court 1995 on a point of law'.

[6] As regards the prayer that leave to appeal be given under r 137 of the Rules of the Federal Court 1995 ('the RFC 1995'), I have covered the issue in *Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771 and I need say no more. My response on the reasons given as to why the appeal should be allowed equally apply here.

[7] However, there is an alternative prayer here ie to refer the issues to this court under r 137 of the RFC 1995. Reliance is placed on the judgment of this court in *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101; [2007] 1 CLJ 565.

[8] Before going any further I would like to state that this judgment focuses only on the issue whether issues arising from a case that commences in the sessions court which is not appealable to this court may be 'referred' to this court for its decision. This judgment is not concerned with a review by this court of its own judgment. So, cases on review by this court of its own judgment will not be considered, neither is the issued decided here.

[9] Jurisdiction of this court is given by law ie the Constitution and statute. The law provides that an appeal from a decision of the sessions court ends at the Court of Appeal. There is no provision anywhere in our law (putting aside r 137 of the time being) that allows such an appeal to this court. I have reaffirmed the position in *Abdul Ghaffar bin Mohd Amin*.

[10] Since there is no appeal to this court, does r 137 of the RFC 1995 allow issues of law to be 'referred to this court? With respect, I do not think so. To allow it to be done is like accepting with the left hand what the right hand rejects. After all, even appeals to this court are only on 'points of law', to use a general phrase to cover the provisions of s 96 of the CJA 1964. When a matter ends in the Court of Appeal, it ends there, the whole of it. There has to be a provision in the law for this court to have jurisdiction to have such issues of law referred to it. We see, for example, in the Industrial Relations Act 1967 a provision that allows the Industrial Court to refer a question of law to the High Court for its determination — s 33A. See also s 16Z Housing Development (Control and Licensing) Act 1966.

[11] Going back to r 137 of the RFC 1995, in my judgment, the same reasons that I have given in *Abdul Ghaffar bin Md Amin* in discussing whether r 137 of the RFC 1995 permits an appeal not permitted by statute equally apply here. There is no valid reason for a distinction to be made in respect of appeal and a "reference".

[12] Regarding *Tan Sri Eric Chia Eng Hock* the passages from that judgment that I have quoted in *Abdul Ghaffar bin Md Amin* speak for themselves, supporting the same conclusion.

[13] It is true that in *Tan Sri Eric Chia Eng Hock* this court allowed the application of the applicant for this court to exercise its inherent jurisdiction of review the decision of the Court of Appeal even though the case commenced in the sessions court.

[14] With respect, I have great difficulty in following the reasoning of Augustine Paul FCJ. Having said what I have quoted in *Abdul Ghaffar bin Md Amin*, the judgment went on to say:

> [17] The corollary is that r 137 comes within the scope of s 16(a) and is therefore lawful. It must be added that even if it can be argued that r 137 does not conform with the requirements of s 16(a) it makes no difference as r 137 merely preserves what had been brought into force by s 3(1)(a).

[15] I have no problem with the first sentence. However, if it were otherwise, as I had said in *Abdul Ghaffar bin Mohd Amin*, it would be ultra vires s 16 of the CJA. But, with respect, I am unable to agree with the view expressed in the second sentence. CLA 1956 concerns civil law, not criminal law. The title of the Act says so. The preamble also provides:

> An Act relating to the civil law to be administered in Malaysia.

[16] By looking at the title of the chapters alone we will find the following:

Part I	Preliminary
Part II	General
Part III	Fatal Accidents and survival of Causes of Action
Part IV	Tortfeasors and Award of Interest
Part V	Contributory Negligence and Common Employment
Part VI	Frustrated Contracts
Part VIA	Apportionment
Part VII	Disposal and Devolution of Property
Part VIII	Miscellaneous

[17] Under 'Miscellaneous' there are sections on agreement by way of gaming or wagering to be null and void (s 26); Infants (s 27); No person chargeable with rent bone fide paid to holder under defective title (s 28); Damages in respect of personal injury (s 28A). For details please refer to the Act.

[18] Those are matters covered by the Act, and they are matters of civil law. Common law of England and the rules of equity made applicable by the Act are those concerning civil law not provided by the Act or any other written law. Once it is provided by our written law, the English common law and the rules of equity are excluded. To read that the English common law exists side by side with a law provided by statute, whether originated from the principles of the English common law or not, is to blatantly disregard the very clear opening words of s 3(1) of the CLA 1956. That cannot be right.

[19] That is in respect of civil law which to a large extent, is not codified. Criminal law, even criminal jurisdiction, has no place in the CLA 1956. It is completely outside the scope of the Act. For example, can a person be charged in Malaysia for a common law offence not codified by the Malaysian law? The answer is certainly 'No'.

[20] So, it is misplaced to apply the CLA 1956 relating to civil law in a criminal case. The reasoning in *Tan Sri Eric Chia Eng Hock* is flawed and that case cannot be resorted to in support of this application.

[21] Of course, this is a civil matter. Even then, we should look closely at the opening words of s 3(1):

> 3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaya, the court shall:
>
> (a) in West Malaysia or any part thereof apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956.

[22] Law has been made that a case that begins in the sessions court is appealable only right up to the Court of Appeal. Even though the provision is as regards appeals, what it means is that it is intended to end there. Otherwise, it would not have said so. An appeal always includes an appeal on points of law. Had Parliament intended that 'points of law' from such cases, though not appealable, may be 'referred' to this court, it would have done so, but those 'points of law' have been shut out from the door of this court by statute when it prohibits the appeals.

[23] Further, we were not shown what the common law of England was on the point, whether as on 7 April 1956 or thereafter. We were only told that the applicant was relying on *Tan Sri Eric Chia Eng Hock*'s case. Even if there was, we were not told what were the relevant statutory provisions in England that led the courts in that country to hold as such and whether the provisions of the written law in England the same as ours, bearing in mind that England does not even have a written constitution. Citing passages from judgments in England alone (even that was not done) is not sufficient. Those views may be expressed in view of the statutory provisions in England, which may be different from those in Malaysia. Regarding reliance on Indian judgments based on the Indian Code of Civil Procedure, I would repeat what I have said in *Abdul Ghaffar bin Mohd Amin* that it is dangerous to simply follow the views expressed by Indian judges on this issue as the Indian Civil Procedure is an Act of Parliament, unlike our RFC 1995 which is a subsidiary legislation. A rule is a rule. It cannot be elevated by the court to the status of an Act of Parliament or the Constitution.

[24] Going back to *Tan Sri Eric Chia Eng Hock*'s case, if we read the judgment of Richard Malanjum CJ (Sabah & Sarawak), even though his conclusion was the same as that of Augustine Paul FCJ, his approach was totally different. The other three judges, including the Chief Justice did not express any opinion. Indeed, going by the report in the CLJ they did not even say that they agreed with either Augustine Paul FCJ and/or Richard Malanjum CJ (Sabah & Sarawak) neither did Augustine Paul FCJ nor Richard Malanjum CJ (Sabah & Sarawak) say that they (the other three members of the bench) agreed with either or both of them. However, I take it they agreed with both Richard Malanjum CJ (Sabah & Sarawak) and Augustine Paul FCJ.

[25] Referring to the judgment of Augustine Paul FCJ, Richard Malanjum CJ (Sabah & Sarawak) said: 'On the issues discussed therein I am in agreement with his *conclusions*.' Then he went on to say 'that there is another aspect in the submission of learned counsel for the applicant which should be considered. The gist of his submission is that in exercising his revisionary power the High Court judge was not exercising his original jurisdiction within the meaning of s 87 of the Courts of Judicature Act 1964 (the CJA)'. After discussing the law, the learned CJ (Sabah & Sarawak) concluded:

> My answer therefore to the primary question is that an exercise of revisionary power by the High Court is not an exercise of an original jurisdiction so as to bring it within the ambit of s 87 of the CJA.

[26] Perhaps, it should be clarified here that, *Tan Sri Eric Chia Eng Hock*'s case commenced in the sessions court. He was charged with an offence under s 409 of the Penal Code together with an alternative charge under the same section. During the trial, the learned sessions court judge ruled that the evidence of six witnesses recorded in Hong Kong was inadmissible. The prosecution requested the High Court to revise the ruling made by the learned session court judge. The High Court exercised its power of revision and ordered that the record of proceedings be admitted in evidence.

[27] So, what is the effect of the judgment of Richard Malanjum CJ (Sabah & Sarawak)? Bearing in mind that s 87(1) of the CJA 1964 only allows appeal to the Federal Court from 'any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court *in its original jurisdiction*' and as the exercise of a revisionary power by the High Court is *not* an exercise of an original jurisdiction, so, there is no appeal from the decision of the Court of Appeal to the Federal Court.

[28] That is all that the judgment of the learned CJ (Sabah & Sarawak) said. The judgment says nothing on the issue whether r 137 of the RFC 1995

empowers this court to allow a reference on points of law to be made to this court in a case arising from the sessions court.

[29] It is for these reasons that I dismissed the instant application with costs and ordered that the deposit be paid to the respondents on account of taxed costs.

Zaki Azmi PCA:

[30] I have read through the judgments of my learned Chief Justice and my learned brother Arifin Zakaria FCJand agree with their conclusions and their reasons for arriving at those conclusions. However, permit me to add some further reasons as to why this application should be dismissed.

[31] The application is made pursuant to r 137 of the Rules of the Federal Court. Reading that rule, it is clear that with the use of the words 'For the removal of doubts' it is merely a reminder of the powers that are inherent in the court. That rule does not confer any extra powers.

[32] The applicant sought to invoke r 137 to indirectly bring from the Court of Appeal, this case which originated in the sessions court. The applicant relied on *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 1 CLJ 565 ; [2007] MLJ 101 ('*Eric Chia*'s case') to support his argument.

[33] I do not think that r 137 being a subsidiary legislation could be read to override s 96(a) of the Courts of Judicature Act 1964 (all sections referred to in this judgment, unless otherwise specifically mentioned, refer to sections of the Courts of Judicature Act). That section is clearly worded to allow the Federal Court to grant leave to appeal from any judgment or order of the Court of Appeal in respect of which the civil cause or matter has been decided by the High Court in exercise of its original jurisdiction. Section 96(b) is not relevant to the issue before us.

[34] Section 67 empowers the Court of Appeal to hear appeals from any judgment or order of any High Court in any civil matter whether made in the exercise of its original or of its appellate jurisdiction. Reading the two sections together, it is clear that for a civil cause or matter that originates in the subordinate court, the Court of Appeal is the apex court.

[35] Section 87 relates to the Federal Court's jurisdiction to hear and determine criminal appeals. This section allows appeals of any criminal matter decided by the High Court in its original jurisdiction only. It does not provide for appeals in criminal matters originating in the subordinate courts.

A **[36]** According to s 50(1), criminal cases decided by the sessions court may be appealed up to the Court of Appeal while those made by the magistrate is also appealable up to the Court of Appeal but only with leave of the Court of Appeal. Section 50 read with s 87 means that, criminal matters originating in the sessions court and the magistrate court must end at the Court of
B Appeal. The restrictions of appeal from the High Court to the Court of Appeal regarding decisions of the High Court in an appeal from the subordinate court must equally apply to a decision of the High Court made in regard to a revision.

C **[37]** I do not read r 137 as meaning to provide another avenue to bring a case originating in the subordinate court to the Federal Court. On an important matter as right of appeal those sections being provisions passed by Parliament, cannot now be read as being subject to a procedural r 137 made by the rules committee. A right of appeal is a substantive right, not a
D procedural right (see *Colonial Sugar Refining Ltd v Irving* [1905] AC 369 Privy Council).

[38] It is also elementary that appeal is a creature of statute and the right of appeal is only as provided by statute (see *Auto Dunia Sdn Bhd v Wong Sai*
E *Fatt & Ors* [1995] 2 MLJ 549).

[39] If there was such an intention to allow criminal appeals up to the Federal Court then it would have been so expressly provided for in an Act of
F Parliament.

[40] As also discussed by my learned brother Arifin Zakaria FCJ, in his grounds (and supported by the authorities cited by him), ss 16 and 17 read together are only to regulate practice and procedure to be followed by the
G Federal Court. It is not meant for the rules committee to provide for substantive rights. In fact, Augustine Paul FCJ in his judgment in *Eric Chia*'s case did specifically mention that r 137 is only procedural in nature (see p 588 para c)

H **[41]** In regard to *Eric Chia*'s case which is a criminal case, I am of the opinion, consistent with the views of my learned Chief Justice and Dato' Arifin, that it should not have been allowed to come to the Federal Court.

[42] In that case, the decision related to the question whether the
I prosecution should be allowed to adduce statements of witnesses recorded by a court in Hong Kong. It is therefore only an interlocutory ruling made by the sessions court. It was taken up to the High Court by way of a revision, which decision was appealed against to the Court of Appeal and subsequently reviewed by the Federal Court pursuant to r 137. The rule reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the *Court*.
>
> (Emphasis added.)

[43] It is to be noted that the word 'Court' mentioned in the context of 'to prevent an abuse of the process of the court', is spelt with a capital 'C'. The Rules define the word 'Court' (also with capital 'C') to mean the Federal Court and includes a judge of that court. In *Eric Chia* 's case, Augustine Paul FCJ while discussing r 137 held that 'the language of s 137 itself is not restrictive so as to limit its application to only reviewing decisions of the Federal Court'. In analysing that word at p 591 of the case he spelt the word court with small 'c'. In my opinion, the word 'the Court', by the use of capital 'C' and the definition given to that word in the Rules must mean the Federal Court. GC Thornton in his book *Legislative Drafting* (4th Ed 1996), (a book which is all too familiar to any legal draftsmen) said at p 87 regarding the use of capital letters:

> The use of capitals should be consistent. If a word is printed so that it begins both with and without a capital in the same statute, it is possible that an inference may be drawn that the word is used in two different senses, or perhaps that two distinct persons are referred to.

[44] In other words, r 137 is intended to be a reminder that the Federal Court has the power to hear any application or make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the 'Federal Court'. It is not intended to enable the Federal Court to review decisions of any other court. If there is injustice or abuse of the process of any court then it could be corrected by way of an appeal but only to the extent allowed by the Federal Constitution and the Courts of Judicature Act 1964. Since as discussed above, cases originating in the sessions court must end at the Court of Appeal, then any injustice or abuse of the process of the court could only be corrected by that court as an apex court. Otherwise the limitation of appeals intended by Parliament will never be achieved. This is another reason to support my arguments above.

[45] For reasons given in the grounds of judgment of my learned Chief Justice and Arifin Zakaria FCJ and the reasons given above, the decision of the Federal Court in that case on this issue cannot therefore be right.

[46] I therefore conclude that *Eric Chia*'s case cannot be relied upon to support this application.

Arifin Zakaria FCJ:

[47] I agree with the learned Chief Justice that this application ought to be dismissed for the reasons given by him. In this regard I am of the opinion that it is necessarily for us to consider the purpose and scope of the Rules of the Federal Court 1995 ('the RFC'). This is found in s 16 of the Courts of Judicature Act 1964 ('the CJA'). Briefly it provides that the purpose for which rules may be made by the Rules Committee appointed under s 17 of the CJA is for regulating the practice and procedure to be followed by the Federal Court in all causes and matters whatsoever in or with respect to which the Federal Court has for the time being jurisdiction. The RFC of course have the force of law as they are made pursuant to a power conferred by a statute. But as a subsidiary legislation it cannot exceed the powers conferred by the statute pursuant to which it is made, therefore, it cannot purports to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights (see dissenting judgment of Seah SCJ in *Dato' Mohamed Hashim Shamsuddin v Attorney General, Hong Kong* [1986] 2 MLJ 112 quoting Lord Davey in *Barraclough v Brown* [1897] AC 615). In *Attorney General v Sillem* (1864) 11 ER 1200 also quoted by Seah SCJ, Lord Wrenbury LC said at p 1208:

> A power to regulate the practice of a court does not involve or imply any power to alter the extent or nature of the jurisdiction.

[48] Similarly in *Dato' Mohamed Hashim Shamsuddin* Abdoolkader SCJ in relation to s 16 of the CJA at p 123 expressed the view that:

> This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting per se to confer jurisdiction where none existed otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein.

(See also *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, on the powers of the Rules Committee.)

[49] Therefore, it will be ultra vires the powers of the Rules Committee to attempt to confer on the Federal Court the power to deal with a matter which is outside its jurisdiction. The rule must strictly be confined to procedural matter only.

[50] It is in the light of the above considerations that r 137 ought to be construed. The said rule provides:

137 For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or effect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[51] The rule merely declares '… that nothing in these Rules shall be deemed to limit or alter the inherent powers of the Court …'.

[52] The word 'Court' here is defined as the Federal Court (r 2). Thus the Rule does not confer an inherent power, it merely declares that the court has such a power. For the present purpose, I will not go into the issue whether there exist such an inherent power as declared by r 137.

[53] Rule 137 merely stipulates that no provision of the RFC should be construed as to limit or affect the inherent powers of the court namely — (a) to prevent injustice or (b) to prevent an abuse of the process of the court. In my opinion it is abundantly clear that r 137 is directed at the provisions of the RFC. It could not have been intended to override the provision of the Federal Constitution or any other written law. Therefore, when s 96(a) of the CJA limit the right of appeal to this court in civil cause or matter in respect of such cause or matter decided by the High Court in the exercise of its original jurisdiction only then r 137 cannot be resorted to over come that bar. Similarly the rule should be not used to override the provision of s 87 of the CJA which limit the right of appeal in criminal cases to those cases which originate from the High Court.

[54] How do we then reconcile the decision of this court in *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101 with what I have stated above.

[55] The answer to this is found in the judgment of the learned Chief Justice in this present case. After considering the judgments of both Augustine Paul FCJ and Richard Malanjum, CJ (Sabah & Sarawak), I agree with the learned Chief Justice that the judgments were flawed. Quite apart from what I stated above, I agree entirely with the reasons given by the learned Chief Justice.

[56] I must add that at the highest the matter should have ended at the Court of Appeal, as the learned High Court judge in that case was exercising his revisionary power. As rightly stated by Richard Malanjum CJ (Sabah & Sarawak) the exercise of revisionary power by the High Court judge is not in law an exercise of his original jurisdiction. Therefore, on that ground the matter could not have proceeded by way of appeal to the Federal Court. Similarly it could not come to this court by way of a review under r 137.

[57] Bearing in mind that the matter under challenged was the exercise of a revisionary power under s 323 of the Criminal Procedure Code ('the CPC') all the more reasons the Federal Court ought not to have entertained the application.

[58] On the revisionary power of the High Court it is correct that this power of the High Court is exercisable at the discretion of the court and the discretion is untrammelled and free, so as to be exercised fairly according to the exigencies of each case (see *R v The Lachiran* ILR 28 Bom 533, followed in *Re Soo Leot* [1956] MLJ 54).

[59] However, in a pending case, as in the case of Tan Sri Eric Chia, the court should only interfere in rare and exceptional cases where such interference is required in the interests of justice. In a pending case no question as to the correctness or propriety of a finding can arise; consequently the High Court can examine the proceedings of subordinate court only to satisfy itself as to their regularity. (See in *re Harbhajan Singh Sodhi* AIR (29) 1942 Nagpur 38; this is a decision based on s 439 of the Indian Code of Criminal Procedure 1898 which is materially similar to our s 323 of the CPC). By s 397(2) of the Indian Code of Criminal Procedure 1973 it expressly provides that the revisionary powers shall not be exercised in relation to any interlocutory order.

[60] In my view, in *Tan Sri Eric Chia*'s case, even the High Court ought not to have interfered in the proceeding pending before the sessions court by calling for a revision. What more in the case of the Federal Court. In a matter such this, since the decision on the admissibility of evidence was made in a pending case the proper course is to allow the case to proceed to its end and for the issue to be canvassed during the appeal stage.

[61] To allow a revision of the decision made by the subordinate court in a pending matter as in *Tan Sri Eric Chia*'s case could lead to delay in the disposal of cases in the subordinate courts.

[62] In *Public Prosecutor v RK Menon & Anor* [1978] 2 MLJ 152, Ajaib Singh J as he then was held that there is no right of appeal against a procedural ruling made by a subordinate court. He cited in support Rose CJ in *Public Prosecutor v Hoo Chang Chwen* [1962] MLJ 284 where His Lordship observed:

> What in effect the learned magistrate would have to decide in either example is whether the statements in question are admissible in evidence. If he decides that they are not, he rules accordingly; if he decides that they are, he also rules accordingly. And this is, in effect, what he has done in the present matter.

> Such a ruling is, in my opinion, not an appealable order. The fact that the Magistrate has gone on to say that copies should be supplied to the defence counsel does not seem to me to affect the position, as in any event, quite apart from any such order from the learned Magistrate, once the statements were produced in evidence in pursuance of a direction under s 116(2) of the Criminal Procedure Code, they would of course become known and available to the defence.
>
> I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.

[63] I am of the opinion that, no logical distinction could be drawn between an appeal and a revision. The above quoted observation equally applies to the exercise of revisionary power.

[64] For the above reasons, I agree with the learned Chief Justice that the decision in *Tan Sri Eric Chia*'s case cannot be relied upon in support of this application.

Application dismissed with costs.

Reported by K Nesan